United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

54

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,132

308

HERMAN F. GLASKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 27 1966

Nathan J. Paulson
CLERK

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
HENRY F. FIELD,
Assistant United States Attorneys.

Cr. No. 729-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Does a reasonable doubt of appellant's guilt arise because of several contradictions of collateral facts arising from the testimony of two prosecution witnesses?
2. Did appellant's alleged lapse of memory of the night in question result in any way from the culpable actions of the police or prosecution?
3. Was the trial court's use of the disjunctive in its charge to the jury likely to confuse it into thinking appellant had some burden of proving his alibi or defense?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,132

HERMAN F. GLASKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 11, 1966, after a three-day jury trial, appellant was convicted of two counts of assault with a dangerous weapon (D.C. Code § 22-502). The jury returned a "not guilty" verdict on a charge of assault with intent to kill (D.C. Code § 22-501).

The facts, in brief, are these. At about 11:30 p.m. on Saturday, April 17, 1965, the eve of Easter, James Chappell and Theodore Gardner, delivering liquor from a store three doors down the street, stepped into the door of an

apartment building and were fired upon by someone with a sawed-off shot gun. Two blasts went off (Tr. 11-12, 26), the first catching Gardner in the arm and knocking him unconscious for "a minute or two" (Tr. 26), the second wounding Chappell in the arm and chest (Tr. 13). Chappell was awake "about two or three seconds" before passing out, and in that time saw one man in the door behind them with a gun (Tr. 13). Neither victim could identify their assailant (Tr. 12, 29). Chappell's next memory was awaking in a hospital "two or three days after" (Tr. 13), and Gardner awoke "lying on the floor." (Tr. 27). No one else was in the building at the time (Tr. 13, 19, 26), although there were "quite a few people in the street—children, teenagers, what have you." (Tr. 21, 34).

At the time of the shooting, Kenneth Banks, a 17 year old (Tr. 54) 10th grade student at Roosevelt High School (Tr. 39), was walking with Burl Holley, also a student at Roosevelt (Tr. 92), on the north side of Webster Street approaching 14th Street (Tr. 40, 93). They heard two blasts "like a shotgun" (Tr. 40, 93), "close" by. (Tr. 41). Two men ran out of an apartment house across the street (Tr. 42, 93), and the one with "what looked like a sawed off shot gun" (Tr. 94) projecting from his coat dropped a bottle and ran across 14th Street past them and down Webster into an alley (Tr. 42, 94-95), while the other ran down 14th (Tr. 42, 94). Both witnesses identified appellant as the man with the "large gun" or "shotgun" (Tr. 42, 94) who had run past them (Tr. 44, 95). The man with the "large gun" or "shot gun" (Tr. 42, 94) then came out of the alley without the gun apparent and approached the two witnesses. Holley had never seen appellant before, but Banks had. Both had good capacity for observation because "there was a light on the corner" and he had run right past them. (Tr. 43, 95-96). When asked what had happened, appellant replied, "I'm not going to stand around and find out." (Tr. 44, 96). Appellant then ran off across the street and down

a parking lot next to the apartment building where the incident occurred. (Tr. 44, 95). After viewing the blood-stained, beer covered floor inside the building (Tr. 74, 97), both witnesses "got scared" and went home.

The next day Banks stopped to get cigarettes at Miller's Liquor Store, where Chappell and Gardner worked. He told Miller what he had seen and Miller summoned the police. Banks described appellant; he had recognized him the night of the 17th (Tr. 52) from about two weeks before, when appellant had been "intoxicated" at Buchanan Cleaners. He had then taken a "good look" at appellant for about "a minute." (Tr. 51-52); Short, the detective, recognized appellant from the description (Tr. 126), and having looked for the gun without success (Tr. 46, 135), Banks and Short then drove to appellant's house, where Short told appellant he was not under arrest and asked him about "a crime that had happened on 14th Street on Saturday night." Short testified that appellant said "he didn't know anything about it, that he hadn't heard anything about it, and that he couldn't have been involved in it because he was at work as a postal clerk at the Massachusetts Avenue branch of the Post Office . . . . [Appellant said] he went to work at 3:30 in the evening, and that he didn't get off, not until 11:30 at night, and he said he didn't get home not until about one o'clock that Sunday morning." (Tr. 127-8). Short then returned to the car, where Banks was waiting, and they drove off. On April 28th, Short saw appellant on the street and, saying he was not under arrest (Tr. 129, 146), asked him to go to the police station for a lineup. There, Banks picked appellant out of the lineup and, on the advice of a United States Attorney, appellant was "advised" and arrested (Tr. 131).

Appellant, the sole witness for the defense, testified that he had been questioned on his porch on April 19th and brought to the station and arrested on April 28th. He appeared in court the next morning. (Tr. 148.) He said he was not advised that he was charged with an

offense on April 17th "until the next week after I was arrested when I was before preliminary in General Sessions." (Tr. 148). At trial on February 10, 1966 he testified he couldn't "exactly recall" his whereabouts on the night of April 17th. He explained: "Well, the time I received and listened to what I was charged with, and found out, I tried to revert back and I was unable to fully come up with what day it was." (Tr. 148-49). He denied committing the offense, owning a shotgun, or ever being in the apartment building in question (Tr. 149). He admitted having "lied" about working at the post office, but said, "I didn't know why he was asking questions, and I just told him the first thing that came in my mind." In fact, he had left the employ of the post office in March, one month before, and was at the time working part time for Buchanan Cleaners. (Tr. 153-54.) He had no trouble remembering his conversation with Short on the 19th, or having done nothing "particular" on the day after this crime, Easter Sunday (Tr. 156). He "probably did" remember on the 19th what happened on the 17th, and he remembered on the 28th what happened on the 17th (Tr. 155, 159). He remembered working for Buchanan Cleaners during the day on the 17th (Tr. 160), and said Buchanan usually closes at 7:00 p.m. on Saturdays (Tr. 162). He finally said, "It was Saturday night, so I couldn't fully remember exactly where I were." (Tr. 156). He admitted to drinking "sometimes." (Tr. 158).

SUMMARY OF ARGUMENT

The contradictions in the two eyewitnesses' testimony were few and collateral to the question of appellant's identity as the man fleeing the scene of the crime with a sawed-off shotgun. They in no way raise a substantial doubt about appellant's guilt. Moreover, if appellant had a lapse of memory concerning that Saturday night or Saturday nights in particular, this lapse in no way resulted from any culpable action by the police or prosecution. Lastly, it was clear from the trial court's charge to

the jury that the prosecution had the burden of proving appellant guilty beyond a reasonable doubt and that the appellant had no burden of proving his alibi.

ARGUMENT

I. The evidence amply supports appellant's conviction.

(Tr. 21, 34, 40, 42-6, 51-2, 58-9, 63, 67-71, 74, 80-81, 83, 93-6, 98, 102, 106, 110-13, 116, 122)

Appellant argues that the conflict in testimony between two of the prosecution's witnesses, Banks and Holley, over points apart from the circumstances incriminating appellant, must raise a reasonable doubt in a reasonable mind about the reliability of their mutually corroborating testimony incriminating him. A brief glance at the record shows this argument to be utterly unpersuasive. There are discrepancies in their testimony to be sure, although far fewer than counsel would have made out, but all these discrepancies concern minor points which a reasonable mind would dismiss as the product of minds attentive to the developing and threatening criminal exploit which Banks and Holley were circumstanced to witness. Neither witness had any interest or motive to falsify, and certainly none was suggested at trial. Upon the vital, incriminating facts, both witnesses agreed in totality, and the record amply supports both the positiveness of their asserted identification of appellant and their opportunity to have observed him at the scene of the crime.

Briefly these asserted inconsistencies melt into the following. Banks said that after appellant disappeared "instead of me waiting for the bus, I just caught a cab and went home" (Tr. 46). He later said that after a bus came by (Tr. 69) he went to survey the lobby of the apartment building and then took a cab home (Tr. 71). These statements are consistent if one assumes, as one must on this appeal (see, *e.g.*, *Seals* v. *United States*, 117 U.S. App. D.C. 79, 81, 325 F.2d 1006, 1008 (1963), *cert. denied*, 376 U.S. 964 (1964)), that the bus for which he

refused to wait was one which would arrive after he took the cab. Appellant tries to make out another inconsistency in Bank's testimony about knowing that the two injured men came from Miller's Liquor Store, but it is clear that the witness drew the connection between the liquor store and the incident because "there was beer and whiskey over the apartment floor," (Tr. 74) and found out about the two injured men from a phone conversation with a friend (Tr. 80-81). Furthermore, the fact that at the time of the incident Banks did not recognize the detectives who came to the scene (Tr. 70), is in no way inconsistent with the fact that he later became acquainted with one of them (Tr. 83).

Appellant makes much of asserted contradictions between the testimony of Banks and Holley on several minor points. (1) That Banks said they were in the "middle of the block" on Webster Street while Holley said they were near the last house, "several yards" from the corner, is hardly a shocking difference. And that Banks said they took a minute getting to the corner (Tr. 50, 93, 106) doesn't mean that it took them a minute of solid walking; Holley also said it took them a while to get there (Tr. 107). Holley may never have seen a third man at the bus stop, and may have mistakenly thought Banks asked appellant what was going on. (Tr. 59, 110-11). Also, Banks and the two victims testified to the presence of a few people on 14th Street at the time, while only Holley said there were none. (Tr. 21, 34, 59, 106). (2) Banks said he heard a sound "like a shot gun" (Tr. 40) and that he saw the barrel of a "large" gun that "looked like it was about as long as a Colt 45." (Tr. 42, 67). Short said Banks gave him "a description of a pistol" (Tr. 135), but this was only Short's conclusion. Holley said appellant was carrying what "looked like a sawed off shot gun." (Tr. 94, 110). (3) That Banks saw a bus and Holley did not remember seeing one during this excitement is hardly surprising (Tr. 68-69, 112).

There is a conflict as to the presence of Bank's girl friend at the dinner from which Holley and Banks were

returning when the crime occurred and one of the two was evidently in error. But since appellant's counsel did not pursue the point at all during cross-examination, the mistake remains of speculative import. Had counsel followed up on the conflict, its basis might have become more apparent. (Tr. 63, 102.)

Banks said that "everyone came running out of the apartment building" after appellant had left, and then Holley and he proceeded over there. Later some police detectives arrived. Holley said that no one appeared until one man came out of his room when they were in the lobby of the apartment building. Holley did not see any policemen arrive. (Tr. 69, 71, 98, 113, 116.) But there is some confusion evident in the record over whether Holley left before Banks, and had this ambiguity been probed the apparent inconsistency might disappear.

Minor contradictions of collateral facts like the ones above are inevitable through the course of any trial, and could be dug out of any transcript in this Court. The cross-examination of Banks and Holley by appellant's counsel was three times as long as their direct testimony, consuming sixty pages of transcript; it was digressive and exhaustive, an example of the classic "fishing expedition." Outside the apartment building both witnesses' attention naturally must have been focused on the main events that were occurring, and as to those events—appellant's identity and the circumstances relating directly to his assault—their testimony matched in nearly every particular. (Tr. 42-45, 51-52, 93-96, 110-11, 122). In no way was their testimony on the collateral matters so conflicting as to raise a reasonable doubt, much less the doubt necessary for this Court to reverse, about the accuracy of their testimony incriminating appellant. Officer Short corroborated their testimony in every particular, and the fact appellant's initial statement to Short turned out to be a bald lie must have had some effect on the jury's verdict. The evidence amply supports appellant's conviction beyond a reasonable doubt.

II. Any delay in arresting appellant was reasonable and not prejudicial, and the government is not responsible for lapses in defendants' memories.

(Tr. 10, 24, 83-4, 98, 127-30, 145-48, 153-56, 159-60)

Appellant argues here that his detention "for at least a week without informing him of the precise nature and circumstances of the crime with which he was charged, deprived him of any opportunity he may have had to prepare a defense and left him only with "I don't remember as a defense." (Brief for Appellant, p. 21). At his trial, appellant had testified that he was not advised of the charge against him "until the next week after I was arrested when I was before preliminary in General Sessions." (Tr. 148). Even if appellant were correct on his factual allegation that he was not advised of the charge against him until one week after his arrest, he would have no cause to complain now, since his defense of lack of memory as to any events on that night made irrelevant what specifically the charge against him was. Furthermore, he did not raise before trial the issue of prejudice by delay in informing him of the charge. See *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965). And furthermore, the record conclusively refutes appellant's factual contention.

The crime involved here occurred at about 11:00 p.m. on Saturday, April 17, 1966 (Tr. 10, 24). This was the eve of Easter (Tr. 156). The only two known witnesses, Banks and Holley, did not inform the police of their knowledge until Monday, April 19, 1966, and Wednesday, April 21, 1966, respectively (Tr. 83-84, 98). Appellant was immediately contacted and questioned about the crime as soon as Banks came forward with his story. At that time Short told appellant he was not under arrest. Short then "told him why I was talking to him, about a crime that had happened on 14th Street on Saturday night . . ." (Tr. 127). In his testimony at trial, appellant said Short asked him where he was "on the preceding Saturday

night." (Tr. 145). Appellant said he knew nothing about any crime and had been at work at the post office at that time (Tr. 127-8). Short then returned to Banks in the awaiting car and they left. Nine days later, on April 28th, Short spotted appellant on the street and asked him if he would come to the station and stand in a lineup. (Tr. 129.) Appellant knew he wasn't under arrest (Tr. 129-30, 146-47); he went to clear his name (Tr. 147). Banks pointed him out of the lineup and, after a call to the United States Attorney's Office, appellant was "advised" and placed under arrest (Tr. 147). The next morning, April 29th, he appeared in court for his preliminary examination (Tr. 148). (See "Complaint" in Original Record on Appeal). The complaint filed on that date charged appellant with assault with intent to rob on April 17th, and a notation shows appellant was informed of its contents. The preliminary examination was postponed until May 7th upon the "request of defendant to make [an] investigation." Appellant's bond was set at $2000. Four witnesses, Chappell, Gardner, Officers Anastasi and Short, were present on the 29th, as was an appointed counsel for appellant, one "Fashu." With this record appellant can hardly complain of any denial of his rights.

Appellant's defense at trial was a denial of the offense and an assertion of lack of memory of the night in question. He had no difficulty remembering his conversation with Detective Short on April 19th, two days afterward, and even remembered the reason why he had lied about having worked at the post office on the night of the 17th. (Tr. 153.) In fact he had left the post office employ in March, and was then working part time for Buchanan Cleaners. (Tr. 154). He testified he "probably did" remember on the 19th and on the 28th what he had done on the 17th (Tr. 155), and on the 28th he had told Short that he had worked at Buchanan Cleaners on the 17th (Tr. 130, 159-60). He said that "I didn't do anything particular Easter" (Tr. 156), the day after the crime, and his explanation for the lapse of memory as to that

particular night was that "It was Saturday night, so I couldn't fully remember exactly where I were." (Tr. 156).

In the context of this case appellant's present contention can only be considered frivolity. The record demonstrates what he testified to at trial, that is, that on April 28th he remembered what he had done on the 17th, and on the 29th he was formally informed in court of the exact charge against him. Before that, by his own testimony he had twice been told, once on the 19th and once on the 28th, that he was being questioned about an incident on the night of the 17th. (Tr. 145, 159-60). Surely he cannot complain that he was not arrested and charged on the 18th instead of the 28th, because this freedom only inured to his favor, and the delay was entirely reasonable; he had concocted an alibi—his supposed work at the Post Office—which needed disproof. As the Supreme Court recently affirmed, "There is no constitutional right to be arrested. The police are not yet required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment [or anything else] if they wait too long." *Hoffa* v. *United States*, No. 32, Dec. 12, 1966 (Slip op. at 17). We have here, moreover, no 106 day delay after the offense and before notice like in *Ross* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 210 (1965), and appellant was represented by counsel or afforded the opportunity of obtaining counsel from the incipiency of the legal process. *Cf. Hood* v. *United States*, No. 19,650, June 30, 1966 (Slip op. at 2, n. 1). If appellant lost his memory, the government certainly cannot be held responsible, for it did not induce that loss in any way.

III. In no way could the jury infer from the trial court's charge that appellant had some burden of showing an alibi.

(Tr. 204-05, 207).

The only portion of the court's charge to which appellant objects is that in which the Court instructed:

> If you have a reasonable doubt about it, or you don't believe that he was there, or that he didn't do it, of course, it would be your duty under the law to return a verdict of not guilty under the third count of the indictment.
>
> You are also instructed that if you believe and believe beyond a reasonable doubt that on or about April 17, 1965, within the District of Columbia, Herman F. Glasker made an assault on Theodore Gardner with a dangerous weapon, that is, a shot gun, or a pistol, it would be your duty under the law to return a verdict of guilty under the fourth count of the indictment.
>
> If you have a reasonable doubt about it, or you don't believe he shot him, or he wasn't even there, of course, it is your duty under the law to return a verdict of not guilty under the fourth count of the indictment. (Tr. 204-05.)

The first and last charges, to which appellant objects here, were sandwiched in between explicit charges that the government must prove appellant guilty beyond a reasonable doubt of the offenses enumerated in each count (Tr. 204, 205). The contested charges are in the disjunctive, and therefore it is literally impossible to infer from them what appellant seeks to infer. No confusion could have resulted, and it would be sheer speculation to suppose otherwise.

Appellant also objects to the court's instruction that:

> From the defense in this case it indicates a sort of defense of alibi, because he can't place himself there, and if he wasn't there, of course, he couldn't be guilty of the crimes. If he was elsewhere, and that is what alibi means literally interpreted, means "elsewhere." And, of course, he doesn't have to prove beyond a reasonable doubt or by a preponderance of the evidence. If the evidence is sufficient to raise a reasonable doubt in your minds whether he was there or not, then, of course, you must acquit him. (Tr. 207.)

He argues the court "demeaned" his defense. Any "demeaning" which appellant infers from this passage must certainly be the product of an exaggerated sensitivity. The court's statement that the defense indicated "a sort of defense of alibi", in context, clearly referred to the literal definition of "alibi," which the judge then went on to explicate. It is not reasonable to infer that the jury probably understood that the court thought appellant's defense amounted to nothing. Furthermore, any possible uncertainty as to appellant's role in relation to the burden of proof was totally dispelled by the court's flat, concluding statement that "If the evidence is sufficient to raise a reasonable doubt in your minds whether he was there or not, then, of course, you must acquit him." (Tr. 207). Appellant's argument that the disjunctive "or if you do not believe that he was there" was thrice reiterated applies equally to the statement "if you have a reasonable doubt about it . . . ." The point is specious.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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No.20132

BRIEF FOR APPELLANT

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

436

NO. 729-65

HERMAN F. GLASKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER AND JUDGMENT OF UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 21 1966

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November 21, 1966

STATEMENT OF QUESTION PRESENTED

This appeal from an order of the United States District Court for the District of Columbia adjudging appellant guilty of two counts of assault with a dangerous weapon and sentencing him therefor presents one basic question:

Whether a conviction should be permitted to stand following a failure to inform appellant of the precise charge against him until nine days after his arrest (30 days after the commission of the crime) thereby prejudicing his ability to defend himself at trial; the filing of a complaint of assault with intent to rob still three days later by one W. F. Dickson otherwise unidentified; an indictment some twelve days after arrest on counts of (1) assault with intent to kill (not guilty), (2) assault with intent to rob (dismissed), (3) assault with a dangerous weapon on one Chappell (guilty), (4) assault with a dangerous weapon on one Gardner (guilty); an arraingment held three months following the arrest; testimony of two young men conflicting in virtually all details, inconsistent with the testimony of the victims, and wholly circumstantial in nature which could under no circumstances be said to have proved appellant's guilt beyond a reasonable doubt; and, instructions which gave to the jury the impression that they had to "believe" defendant was elsewhere in order to find him not guilty of assault with a dangerous weapon.

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 729-65

HERMAN F. GLASKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER AND JUDGMENT OF UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case involves an appeal from an order of the District Court, dated March 18, 1966, adjudging appellant guilty as charged upon a verdict of guilty on two counts of assault with a dangerous weapon and sentencing him to imprisonment for a period of three (3) to ten (10) years (T.P., 2, 6).[1/] The jursidiction of the District Court to enter such an order is based on Title 22, Section 502 of the District of Columbia Code, 1961 e.d. The jurisdiction of this Court to reverse that order on appeal is conferred by Sections 1291 and 1294 of the Judicial Code (28 U.S.C., Sections 1291 and 1294), and was invoked by a petition for leave to prosecute an appeal without prepayment of costs which was granted by this Court on April 13, 1966 (T.P. 1).

STATEMENT OF THE CASE

I

This case involves a senseless and brutal crime which occurred about 11:30 p.m. on the evening of April 17, 1965 (Tr. 10-13, 24-27). On that evening, Mr. James H. Chappell and Mr. Theodore Gardner were at work at the Ben Miller Liquor Store at 4413 14th Street, Northwest, in Washington, D.C. Around 11:30 p.m. they were asked by the proprietor of the store to deliver a case of beer, a fifth of whiskey, and change

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1/ Reference is to pages of the transcript of proceedings (T.P.) which are on file with this Court and are numbered in a reverse order of their entry.

for a one hundred dollar bill to apartment no. 102 in an apartment house located at 4403 14th Street, Northwest (Tr. 10, 24-25.) Mr. Miller requested Gardner to accompany Chappell on the delivery "in case anything happened". (Tr. 16.) Chappell and Gardner left the liquor store together and proceeded the few doors down the street to the apartment house. They opened the lobby door of the apartment house, stepped inside, and walked up a few steps to a hallway (Tr. 11, 25), at which time Chappell heard a noise behind him like a door being forced open and as he turned a blast went off and he was shot (Tr. 11-12.) Chappell said he could not identify the person who had shot him, but before he became unconscious he saw that there was only one person standing in the door with a gun and could tell whether that person was white or colored. (Tr. 12-13.) Gardner was shot before Chappell, saw no one, and when he regained consciousness a few moments later three people were in the lobby with him. (Tr. 27,36.) He got up and went back to the liquor store, informed the proprietor of what had occurred, and asked him to call the police. (Tr. 25-28.) While Gardner was unconscious, Chappell apparently, in a dazed condition, wandered to an upper floor of the building and was later found in an apartment in that building. (Tr. 65-66.)

II

The case against appellant is found entirely in a story told on the witness stand by two young men, Kenneth Banks, aged 17 (Tr. 54), and Burl Holley, students at Roosevelt High School. (Tr. 54, 92.)

The principal figure in the story is Kenneth Banks and the following narrative of the events of April 17, 1965, is based upon the story told by him unless otherwise indicated.

Approximately two weeks before the crime of which appellant was convicted took place, Kenneth Banks took a pair of slacks to Buchanan Cleaners to be pressed. (Tr. 51-52, 84.) While at the cleaners, he took particular notice of an intoxicated man (appellant) standing outside the cleaning store. (Tr. 85-86.)

In apartment no. 25 on the second floor of the apartment building in which the crime took place lived the girl friend of Kenneth Banks. (Tr. 61-62.) At 5:30 p.m. on the day the crime was committed Banks, who had been in the apartment building many times, went to apartment no. 25 to get his girl and take her to a dinner (Tr. 62-63) at a house at 1501 Webster Street about a block and a half from the apartment house. (Tr. 56.) Banks in the company of his friend Burl Holley and, presumably, his girl friend arrived at 1501 Webster Street at about 8:00 p.m. (Tr. 57.)

Banks and Holley left the dinner at about 11:30 p.m. (Tr. 40, 57) in the company of one Paul Johnson, according to Holley, who left them and proceeded west on Webster Street toward his home at 1732 Webster Street. (Tr. 104.) Banks' girl friend did not leave the dinner with the others but spent the night at the friends' house. (Tr. 63.)

Banks and Holley proceeded east on the north side of Webster Street toward a bus stop at which Banks planned to board a bus and go to his home at 4407 Eads Street, Northeast. (Tr. 54, 57-58.) When about in the middle of the block (Tr. 58) they heard a loud noise which sounded like a gunshot. (Tr. 40-41.) They proceeded toward the bus stop which they reached about one minute later. (Tr. 58.) A man was also waiting at the bus stop and a "few" people were walking up and down 14th Street but there was no commotion or gathering of a crowd at that time. (Tr. 59.)

Shortly after they arrived at the bus stop two men came running from the apartment house of Banks' girl friend. One ran south on 14th Street and out of sight and the other ran across 14th Street in the direction of the three waiting at the bus stop. (Tr. 42-43.) The man who came across 14th Street toward them ran into an alley on Webster Street on the "opposite side" from where Banks, Holley and the man were standing at the bus stop. (Tr. 44.) As he ran past, Banks noticed that there was a "big gun" under his coat. (Tr. 42.) His later description of this weapon, according to Officer Short, fitted the description of a pistol (Tr. 135) although Banks saw only the barrel of the weapon protruding from under the coat. (Tr. 42.)

After an interval of a few seconds the man emerged from the alley without the gun. (Tr. 45, 68.) He approached the group at the bus stop and the man who had been standing at the bus stop with Banks and Holley asked this man what had happened (Tr. 44, 68), to which came the reply, "I'm not going to stand around and find out". (Tr. 44.)

With that the man left Banks, Holley and the man with whom he had spoken, went back across 14th Street and disappeared through a Safeway parking lot next to the apartment building. (Tr. 45.) Banks then testified that he was frightened and, immediately after the man had left through the parking lot, Banks, "instead of waiting for the bus, . . . caught a cab and went home". (Tr. 46.)

Two days later, Monday, April 19, Banks returned to the neighborhood with his mother to visit an aunt living at 1633 Webster Street. (Tr. 73.) While there, he went to Miller's Liquor Store to purchase a package of cigarettes for his mother. (Tr. 47, 73.) At that time he told Mr. Miller what he had witnessed the previous Saturday evening. (Tr. 47, 82-83.) Mr. Miller reported this to the police. (Tr. 47, 83.)

Banks then went to the police precinct (Tr. 84) and spoke to Detectives Anastasi and Short. (Tr. 83, 125-126.) He described to Detective Short the man he had seen run from the apartment building with the gun as the man he had seen intoxicated in front of the Buchanan cleaners two weeks before, the appellant. (Tr. 84, 126.)

Officer Short placed Banks in the back seat of a police car and drove to appellant's house. (Tr. 134.) They saw appellant approaching his home and Officer Short got out of the car and walked up to him. (Tr. 126.) Officer Short asked appellant his name and address and his whereabouts the previous Saturday evening. (Tr. 127-128, 145.) Appellant answered that he had been working at the Post Office that night (Tr. 145) because he said the first thing that came into his mind. (Tr. 153, 155.) Officer Short then got back into his car and left.(Tr. 128.) Banks had witnessed this entire episode from the back seat of Officer Short's car. (Tr. 49-50; 89-90.)

III

Nine days later, April 28, 1965, Officer Short again approached appellant and asked him if he would accompany the Officer to the 10th Precinct as the incident of April 17, 1965, was still under investigation. (Tr. 129-130, 146.) He informed appellant that he would be brought back later. (Tr. 146.) The appellant willingly accompanied Officer Short to the precinct house and once there was requested to stand in a line-up with five other men. (Tr. 131, 147 .) Appellant readily agreed to do this as he wished to be cleared of any suspicion. (Tr. 130, 147.) Kenneth Banks was then asked if he saw anyone familiar in the line-up and he picked out the man whom he had seen speaking to Officer Short and had seen intoxicated in front of Buchanan's Cleaners, the appellant. (Tr. 131, 147, 160.) Appellant was then taken upstairs and Officers Short and Anastasi, doubtful if they had sufficient evidence to make an arrest, called the U. S. Attorney's office. (Tr. 147.) Following the telephone conversation appellant was immediately arrested and placed in jail. (Tr. 147.) Appellant was not informed of the precise charge against him until a week later when he was taken to the Court of General Sessions for preliminary examination. (Tr. 148.) By that time he could not remember where he was at the precise time the crime was committed (Tr. 148-149, 153.) nor could he secure the testimony of witnesses who could verify his whereabouts. (Tr. 143.)

On May 10, 1966, a complaint was filed against appellant by one W. F. Dickson, otherwise unidentified in the record, charging appellant with intent to commit robbery. On July 6, 1965, appellant was indicted for intent to kill, assault with intent to commit robbery and two counts of assault with a dangerous weapon. Appellant was ultimately arraigned on July 27, 1965, and pleaded not guilty. Appellant was brought to trial on February 7, 1966, and on February 11, 1966, he was found not guilty of assault with intent to kill, but guilty of the two counts of assault with a dangerous weapon. (T.P., 2.) 2/

On March 18, 1966, the District Court entered its order adjudging appellant guilty as charged and sentencing him to three to ten years imprisonment. (T.P., 2.)

IV

This Statement of the Case is lenghty and detailed because the facts material to the consideration of this case demand it. The detailed facts relating to Banks' story are each material as each of them, excepting only the few facts necessary to incriminate the appellant, were contradicted by Banks himself on cross-examination or by the corroborative witness Holley.

The story related by Kenneth Banks sounds quite plausible. It is the story of a boy who has heard something that sounded like a shot and has seen a man run from a building with a gun and then run off into the night. It is understandable that this boy, or any boy, would have been too frightened to stand there waiting for a bus and would have hailed the first cab and gone straight home without reporting the incident to the police.

2/ The charge of assault with intent to commit robbery was dismissed by the District Court. (T.P., 2.)

Banks' cross-examination, however, revealed that he had not told the truth when he testified that as soon as appellant had run away from the scene he was so frightened that "instead of waiting for the bus [he] just caught a cab and went home." (Tr. 45.) Pressed about the activities of the man who had apoken to appellant at the bus stop after the latter had emerged from the alley, Banks testified that a bus pulled up and the man got on the bus but Banks did not. (Tr. 68-69.) Banks even described the bus as not being crowded. (Tr. 69.)

Further cross-examination revealed that Banks had not told the entire story of what occurred after appellant left the scene. Asked what he did after the bus pulled away Banks said (Tr. 69): "Well, after the bus pulled away everyone came running out of the apartment building, and then I went across to see what was happening." He testified that he and Holley "walked over to the crowd at the apartment building" (Tr. 71), stayed around about five minutes until after two detectives "and then some more" police arrived (Tr. 70), left the scene with Holley, caught a cab and went home. (Tr. 71.)

Cross-examination about his visit to the Liquor Store the following Monday to purchase cigarettes for his mother, revealed another aspect to the story which he had not related before. Banks not only did not immediately leave the scene by taxicab as his direct testimony indicated, but he did not wait around in front of the building with the crowd until after the police arrived as his cross-examination up to that point seemed to indicate. When asked whether

he knew someone from Miller's Liquor Store had been injured, he admitted that he had actually entered the apartment house and examined the place where the crime had been committed (Tr. 73-75):

"Q And when you went into Miller's Liquor Store did you know that someone from that store had been injured?

A Yes, I did.

Q When did you find that out?

* * * *

A Because the night the accident happened there was beer and whiskey all over the apartment floor.

Q Oh, you went inside the building; is that correct?

A Yes.

Q I see. And you knew from the beer and whiskey that somebody from Miller's Liquor Store had been injured; is that right?

A Yes.

Q Did you see anybody from the liquor store that you knew inside the lobby?

A No, I did not.

Q You didn't. In other words, you just assumed that because there was broken whiskey bottles and beer, that somebody from Miller's Liquor Store had been hurt; is that right?

A Yes."

Later, during his cross-examination Banks again varied his testimony by stating that he knew two men had been injured because on Sunday, April 16, he telephoned Paul Johnson who had been at a dinner party with Banks and Holley and Banks' girl that night and Johnson told him that two men from the liquor store had been injured

in the lobby of the apartment house (Tr. 80-81.) 3/

Another development on Banks' cross-examination became significant because of the testimony of Officer Short. Banks' identification of appellant as the man who ran from the scene appears quite positive on the record because he had noticed the man in an intoxicated condition two weeks before, yet Banks on cross-examination said he did not recognize either of the two detectives who arrived at the scene. (Tr. 70.) One of those officers was Detective Anastasi, according to Officer Short (Tr. 136), and Banks spoke to him at the precinct house only four days after he had seen him at the scene of the crime. (Tr. 83-84.)

Even more significant than the inconsistencies in Banks' testimony is the effect upon Banks' testimony of the testimony of the only corroborative witness, his friend Burl Holley. The latter's testimony contradicts that of Banks in every particular except the thin thread of story necessary to incriminate appellant.

Burl Holley's story was inconsistent with that told by Banks in the following respects:

1. At the time the shot or shots were fired Banks said they were about in the middle of the block and it took about one minute to get to the bus stop (Tr. 58); Holley

---

3/ Burl Holley also testified that he spoke to Paul Johnson on the telephone on the day after the crime had been committed and discussed the incident which he had witnessed, but he did not learn of any injuries to anyone from Johnson or anyone else until he talked to the police the following Wednesday. (Tr. 117.)

said they were near the last house in the block and close to the corner (Tr. 93), only "several yards" from the corner (Tr. 106).

2. Banks testified that there was a man waiting for the bus and that there were a few people on 14th Street (Tr. 59); Holley testified there was nobody on the street (Tr. 106) and nobody at the bus stop (Tr. 111). 4/

3. Banks testified that the appellant carried a gun under his coat which looked like a pistol (Tr. 42, 67) and that the gun was not carried in appellant's hand (Tr. 67-68); had described the weapon to the police and the description of the weapon which he gave to them was the description of a pistol (Tr. 135); Holley testified that the gun looked like a sawed-off shotgun (Tr. 94, 108) and was carried in appellant's hand. (Tr. 110.)

4. Banks testified that the man who was standing at the bus stop with Banks and Holley spoke to appellant when appellant came out of the alley and asked appellant what had happened (Tr. 44, 67-68), but Holley testified that there was no such man present (Tr. 111) and that Banks himself addressed the appellant as he emerged from the alley and asked him what had happened (Tr. 96, 112.)

4/ Each of the victims, contrary to both Banks' and Holley's testimony, testified that there were "quite a few" people on the street seconds before they were shot, including "children, teen-agers." (Tr. 21, 34.)

5. Banks testified that the man who had been standing at the bus stop and who had addressed appellant boarded a bus which drove up after appellant left the scene and Banks described the bus as not being crowded (Tr. 68-69); Holley testified that he did not remember any bus. (Tr. 112.)

6. Banks testified that his girl friend who lived in apartment number 25 on the second floor of the apartment building where the crime occurred had been at the dinner which he and Holley and Paul Johnson had attended prior to their witnessing the incidents of April 17, 1965, and that the girl had spent the night there (Tr. 63); Holley testified that the girl had not been at the dinner. (Tr. 102.)

7. Banks testified that "everyone came running out of the apartment building" as they went across the street to see what was happening (Tr. 69) and that there was a crowd at the apartment building as he and Holley walked toward it (Tr. 71); Holley testified that nobody was on the street as they walked across the street and into the apartment (Tr. 113.)

8. Banks testified that Holley stayed with him for about five minutes after they left the apartment house, was with him when the police arrived and until the time he caught a taxicab to go home (Tr. 71); Holley, however, testified that they did not wait for the police to arrive after they left the building but walked to the corner where Banks caught a cab and then

Holley walked straight home (Tr. 98) and he testified further that he did not see the police arrive. (Tr. 116.)

In addition to the fact that the stories told by these two witnesses are contradictory in virtually everything except the incrimination of appellant, Holley testified that he was recognized while he and Banks were in the empty lobby viewing the blood and broken bottles when a man whom Holley knew emerged from one of the apartments. (Tr. 115.) This man, identified by Holley as one Redford (Tr. 115), is not otherwise referred to in the record.

Both Banks and Holley testified that the lobby was empty when they entered it (Tr. 75, 114), then Mr. Redford appeared on the scene. Mr. Gardner testified that three people were present in the lobby when he awoke and returned to the liquor store. (Tr. 27, 36.)

STATEMENT OF POINTS

I. The conflicting evidence of record was insufficient to support a verdict of guilty beyond a reasonable doubt.

II. The delay between the arrest of appellant and the time he was informed of the specific nature of the crime for which he had been arrested prejudiced his ability to defend himself and constitutes reversible error.

III. Prejudicial error was committed by the trial judge in instructing the jury in such a manner as to give the impression that the jury had to "believe" the appellant was elsewhere at the time of

the crime in order to find him not guilty of assault with a dangerous weapon thereby shifting some of the burden of proof to appellant.

SUMMARY OF ARGUMENT

The evidence to establish the guilt of appellant as the man who shot Mr. Chappell and Mr. Gardner, is insufficient beyond a reasonable doubt because based solely on the testimony of two young men which is conflicting and contradictory in all respects save only their agreement that two men ran from the building, one of whom was appellant; that he carried a gun; went into an alley; emerged without the gun; and, ran off into the night. The record is completely silent on the results of the investigation conducted by the police or the attempts by the police, if any, to verify one or the other of the conflicting tales told by the witnesses.

The circumstances surrounding the arrest of appellant were unusual. He was finally arrested after a line-up identification by a youth whom the police knew had seen appellant twice before and then only after a telephone conversation with the U. S. Attorney's office. Holley who at that time had never seen appellant, unless there had been a man run past him following the shooting and that man was appellant, was never asked to view a line-up. Appellant was placed in jail and was not informed of the specific nature of crime for which he had been arrested. By the time he received this information he was unable to recall his whereabouts at the precise time the crime occurred and was thereby unable to defend himself

except to say that he was innocent.

To compound this tragedy of errors and contradictions, the trial judge instructed the jury to find the appellant not guilty of assault with a dangerous weapon if they had a reasonable doubt as to his guilt or if they "believed" he was not there or had not shot the victims. Such an instruction considered together with the additional instruction that they consider all the evidence and against the failure of the appellant to prove he was somewhere else could well have mislead the jury to conclude that appellant's failure to prove an alibi required a guilty verdict.

ARGUMENT

POINT I

The Conflicting Evidence Of Record Was Insufficient To Support A Verdict Of Guilty Beyond A Reasonable Doubt.

With respect to Point I, appellant desires the Court to read the following pages of the Transcript: Tr. 45, 68-69; 73-75, 80-81, 117; 58, 93, 106; 21, 34, 59, 106, 111; 42, 67-68, 94, 108, 110; 44, 96, 112; 63, 102; 71, 113; 98, 116; 27, 36, 114; 84, 126, inclusive.

Viewing the testimony of Banks and Holley one could not reasonably conclude that appellant was guilty of assault with a dangerous weapon or even that he was in the vicinity of 14th and Webster Streets when the crime occurred. It is simply inconceivable that Banks and Holley could have been mistaken about every detail of every occurrence of that eveing and be so certain of the identity of appellant. Of course,

the jury must try the facts and determine the credibility of witnesses and it is not up to this Court to do so. Hardeman v. U.S., 82 U.S. App. D.C. 194, 163 F.2d 21 (D.C. Cir., 1947). However, determining credibility usually involves a choice between opposing witnesses but in this case such a determination really lay between Banks and Holley. If one believes Banks' story then Holley lied or erred in virtually everything he said except the identification of appellant; and the same is true of Banks' testimony if one were to believe Holley. Faced with such totally conflicting testimony a reasonable mind must reject the hypothesis that since only the incriminating identification of each witness was consistent that appellant's guilt was established beyond a reasonable doubt. In Douglas v. U. S., _____U.S. App. D.C. _____, 239 F.2d 52 (D.C. Cir., 1956) this Court held that "a jury may not be upheld in arbitrarily convicting of a crime". This Court held (239 F.2d at 59):

> "We as the reviewing court must be able to say that the result is rationally consistent with the evidence, measured by the required degree of proof."

Certainly, here, the contradictory stories of these youths and the absence of any evidence of police investigation to verify any of the aspects of their conflicting stories, renders a verdict of guilty beyond a reasonable doubt an arbitrary conviction of a crime which this Court must set aside.

POINT II

The Delay Between The Arrest Of Appellant And The Time He Was Informed Of The Specific Nature Of The Crime For Which He Had Been Arrested Prejudiced His Ability To Defend Himself And Constitutes Reversible Error.

With respect to Point II, appellant desires the Court to read the following pages of the Transcript: Tr. 84-86, 100, 121, 126-131, 145-149, 152-153, 159-160, inclusive.

The appellant was first approached by Officer Short on Monday, April 19, 1965, in front of appellant's home. (Tr. 126.) The testimony of Officer Short clearly indicates that he spoke to appellant only in the most general terms "about a crime that had happened on 14th Street on Saturday night". (Tr. 127, 145.) The police officer did not tell appellant that he had been identified as one of the men who ran from the scene. Officer Short at no time indicated that appellant reacted in any manner other than that of an innocent man who was certain he had nothing to worry about in connection with the crime.

When Officer Short asked appellant his whereabouts on the previous Saturday night, appellant, not knowing the precise time Short was concerned about and having only recently left the employ of the Post Office Department, responded with the first thing that came to mind that he had been at work at the Post Office from 3:30 p.m. to 11:30 p.m. (Tr. 128, 145, 153.) Appellant's statement of his whereabouts was untrue and he admitted its falsity before the jury (Tr. 153) but at the time and under the circumstances confronting him he did not take time to consider its gravity or implications. (Tr. 153.)

Appellant was confronted by the police only two days after the crime had taken place. It is reasonable to expect a man guilty of having committed a crime on the date in question or a man who had been told he had been identified as one involved in a crime, to have set about immediately to create or verify an alibi. It is also reasonable to expect an innocent man who was not told he had been identified as having been at the scene of the crime to make no attempt to verify an alibi and appellant made no such attempt at that time.

Appellant was not approached again by the police until April 28, 1965, when he was again stopped by Officer Short on 13th Street on his way home. (Tr. 129.) Officer Short informed appellant that he was not under arrest but asked if he would agree to accompany him to the precinct as he was still a suspect in "this case on 14th Street, this shooting case." (Tr. 129-130.) Officer Short told appellant he wanted to ask him a few questions and that he would bring him right back. (Tr. 146.)

After they arrived at the precinct he was asked to get into a line-up and Short mentioned to appellant that he had a matter to clear up involving a holdup of some delivery boys of a liquor store. (Tr. 146-147.) Appellant in response to Officer Short's questions told him that he knew nothing about the incident, had not read about it in the newspapers, and had not been told about it by the owner of Buchanan's cleaners where appellant worked part-time. (Tr. 147.) Appellant readily agreed to appear in the line-up to help clear up the matter (Tr. 147) because he did not want to go to jail for something he had not done. (Tr. 130, 147.)

Five other men appeared with appellant in the line-up (Tr. 130-131, 147); Kenneth Banks was asked which of the men he had seen before and immediately pointed out appellant. (Tr. 131, 147.) Banks had seen appellant with Officer Short on April 19, and testified that he had also seen him two weeks before the crime occurred in front of Buchanan's cleaners (Tr. 84-85, 160) and had told Officer Short about it. (Tr. 86.) Consequently, the line-up identification added nothing to the case against appellant. On the other hand, Burl Holley testified that he had never seen appellant prior to April 17, and did not see him thereafter until he appeared in Court at various times when the trial was called and then postponed. (Tr. 100, 121.) Yet, for some reason unexplained in the record Burl Holley was not asked to view the line-up and did not view the line-up. (Tr. 100.)

Regarding the arrest of appellant Officer Short testified as follows (Tr. 131):

"Q Who did he pick out?

A He picked the defendant, Mr. Glasker.

Q And was he subsequently arrested?

A At that time he was advised and placed under arrest."

Officer Short's testimony is vague regarding the precise time appellant was arrested and the "advice" given appellant is meaningless since one cannot tell if he was advised as to the crime with which he was charged, advised as to his right to counsel, advised as to his statements being used against him or advised as to something else.

Appellant's unchallenged and uncontradicted testimony on this point, however, is as follows (Tr. 147-148.):

"Q Now, after he pointed to you, what is the next thing that happened?

A Well, I was immediately carried back upstairs and there was more conversation, questioning. So they told me that they wouldn't say I did it, had no evidence to prove it, he and Officer Anastasi [sic], so they called the U. S. Attorney's office.

Q Without telling us the telephone conversation, what happened to you after the call was completed?

A I was immediately arrested.

Q And where were you taken, sir?

A I was locked up in Number 10 and then brought downtown later that night.

Q Did you go into court?

A The next morning.

Q Now, how long did you stay locked up before you were released on bail?

"MR. COLLINS: I object. I don't think that is relevant.

"THE COURT: Sustained.

BY MR. GARBER [defense counsel]:

Q Now, Mr. Glasker, when was the first time that you were notified that you were charged with an incident which occurred on April 17th?

A I was not advised until the next week after I was arrested when I was before preliminary in General Sessions."

The trial court erred in sustaining the prosecuting attorney's objection because the extent of appellant's detention is not only relevant but highly material. Had he been allowed to testify he would have stated, as the court and police records will show, that he was in jail from

April 28, until the latter part of the week of May 9.

Appellant, at the time he was approached by Officer Short was told he was not under arrest and that he would be returned after going to the precinct. At that time he was not told that he had been identified . He did not know the details of the crime that had been committed. He had done nothing in preparation of a defense.

By the time he knew the precise nature and circumstances of the crime with which he was charged he could not recall specifically where he had been at the time the crime was committed. But even if he could have recalled where he had been at 11:30 p.m. on April 17, 1965, by the time he was released from jail all hope was gone of securing the testimony of someone regarding his whereabouts on an evening almost a month before. (Tr. 148-149, 151-153, 155-156.)

The detention of appellant for at least a week without informing him of the precise nature and circumstances of the crime with which he was charged, deprived him of any opportunity he may have had to prepare a defense and left him only with "I don't remember" as a defense. This delay coupled with the further detention of appellant until the week of May 9 substantially prejudiced his rights in the trial of his case no less than would have a confession extracted between the time of his arrest and his preliminary hearing. Giordenello v. United States, 357 U.S. 480 (1958); Mallory v. United States, 354 U.S. 449 (1957).

Therefore, it is respectfully submitted that the judgment below be reversed.

POINT III

Prejudicial Error Was Committed By The Trial Judge In Instructing The Jury In Such A Manner As To Give The Impression That The Jury Had To "Believe" The Appellant Was Elsewhere At The Time Of The Crime In Order To Find Him Not Guilty Of Assault With A Dangerous Weapon Thereby Shifting Some Of The Burden Of Proof To Appellant.

With respect to Point III, appellant desires the Court to read the following pages of the Transcript: Tr. 199-200, 204-205, 207, inclusive.

During the course of its charge the Court admonished the jurors, quite properly, to consider all of the evidence presented. (Tr. 199-200.) However, in instructing them specifically on the charges of which appellant was found guilty the trial court strongly implied that appellant had to make some sort of defense to the effect that he wasn't at the scene and that the jury had to "believe" he wasn't at the scene in order to acquit him. With regard to the charge of assault with a dangerous weapon upon Mr. Chappell the Court instructed (Tr. 204):

> "If you have a reasonable doubt about it, or if you don't believe that he was there, or that he didn't do it, of course, it would be your duty under the law to return a verdict of not guilty under the third count of the indictment."

And regarding the same offense against Mr. Gardner the Court instructed (Tr. 205):

> "If you have a reasonable doubt about it, or you don't believe he shot him, or he wasn't even there, of course, it is your duty under the law to return a verdict of not guilty under the fourth count of the indictment."

Even more serious, however, were the Court's closing words to the jury (Tr. 207):

> "If you have a reasonable doubt about it, or you do not believe that he was even there, then, of course, you must return a verdict of not guilty under the first count of the indictment.
>
> From the defense in this case it indicates a sort of defense of alibi, because he can't place himself there, and if he wasn't there, of course, he couldn't be guilty of the crimes. If he was elsewhere, and that is what alibi means literally interpreted, means 'elsewhere.' And, of course, he doesn't have to prove beyond a reasonable doubt or by a preponderance of the evidence. If the evidence is sufficient to raise a reasonable doubt in your minds whether he was there or not, then, of course, you must acquit him."

Here the Court clearly demeans appellant's defense and places upon him some measure of proof after telling the jury three times that if they believed appellant to be elsewhere they should acquit.

In Bollenbach v. United States, 326 U.S. 607 (1945) the Supreme Court said (326 U.S. at 612):

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

Again at 326 U. S. 613:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

And again at 326 U. S. 614:

> "It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

In Miller, et al. v. U. S., (10th Cir., 1941), 120 F.2d 968, The United States Court of Appeals for the Tenth Circuit held (120 F.2d at 972):

> "The instruction in one part told the jury that if, after a consideration of all the evidence, including that of good character, the jury entertained a reasonable doubt, then they should acquit. However, in another part of the instruction it limited the consideration of the character testimony to a determination whether the prosecuting witnesses committed perjury or were mistaken. From a reading of the whole instruction the jury may have concluded that if they believed from all the evidence, including that of previous good character which was offered only to show that the witnesses testifying for the prosecution were mistaken or testified falsely, then they should acquit. This clearly would be erroneous. It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

It is respectfully submitted that the Miller case decision is applicable here for if the jury believed that they had to find some evidence that appellant was elsewhere in order to acquit him they were led to the wrong conclusion.

The erroneous instruction of the trial court might not be considered prejudicial error in a case in which there was strong evidence against a defendant, but here is a case in which the evidence consists only on contradictory stories told by two youths. In Thomas v. U. S., (8th Cir., 1960) 281 F.2d 132, the United States Court of Appeals for the Eighth Circuit cited the rule (at 136):

> " . . .'error which in a close case might call for a reversal may be disregarded as harmless where the evidence of guilt is strong.' Garner v. United States, 8 Cir., 277 F.2d 242, 245, citing Glasser v. United States, 315 U.S. 60, 67, 62 S.Ct. 457, 86 L.Ed. 680; Homan v. United States, 8 Cir., 279 F.2d 767, 773."

The errors in the instructions were not called to the attention of the Court below when made, however, Rule 52(b) of the Federal Rules of Criminal Procedure states that "plain errors of defects affecting substantial rights may be noticed although they were not brought to the attention of the Court".

In United States v. Levi, 177 F.2d 827 (7th Cir., 1949) at page 831, the Court says the appeals court, in the public interest, may "notice errors to which no exception has been taken". In United States v. Atkinson, 297 U.S. 157, 80 L.Ed. 555 (1936) where the government had failed to question, by objection or any other means, the trial judge's instruction to the jury, the Court said (at page 159):

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court . . . In exceptional . . . cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the fairness, integrity,or public reputation of judicial proceedings."

The Court cited on this point New York Central R. Co. v. Johnson, 279 U.S. 310, 319, 73 L.Ed. 706, 711 (1929), and Brasfield v. United States, 272 U.S. 488, 450, 71 L.Ed. 345, 346 (1926). See also Screws v. United States, 325 U.S. 91, 89 L.Ed. 1495 (1945).

Analogous to the point at issue in the present case is Payton v. United States, 96 U.S. App. D.C. 1, 222 F.2d 794 (D.C. Cir., 1955), where several errors in the admission of evidence had been committed by the trial judge, including the allowance into evidence of an inadmissible confession. Judge Fahy said at page 797: "The absence of objections ordinarily relieves an appellate court of the necessity of noticing errors, but it does not preclude the court from doing so."

After citing Rule 52(b) of the Federal Rules of Criminal Procedure, Judge Fahy quotes from McAffee v. United States, 70 U.S. App. D.C. 142, 105 F.2d 21 (D.C. Cir., 1939) at page 151:

> "It is settled that if plain error is committed in a matter vital to the defendant in a criminal case, the appellate court is at liberty to notice and correct it, even though it has not been brought to the attention of the trial judge or the appellate court in the usual manner."

Judge Fahy goes on to say ". . . the errors we have discussed affected substantial rights and deprived appellant of a fair trial . . . Therefore, however unfavorably to appellant we might view the evidence, . . . a new trial will be granted." To the same effect, see Meadows v. United States, 65 U.S. App. D.C. 275, 82 F.2d 881 (D.C. Cir., 1936); Pratt v. United States, 97 U.S. App. D.C. 184, 225 F.2d 23 (D.C. Cir., 1955).

In a concurring opinion in Mullen v. United States, 105 U.S. App. D.C. 25, 263 F.2d 275 (1958), Judge Fahy comments on the inadmissibility of a statement by a witness on the stand at page 277:

> "The lack of objection to this testimony does not preclude our ruling upon its admissibility . . . the fact that the judge called the witness tended to restrain objection. In addition, uncertainty as to the applicable rule of evidence goes far to excuse failure to object. But more important, the testimony was so critical that we should exercise our discretion to consider its admissibility even if not required to do so."

It is, therefore, clear that an appellant may call to the attention of the appeals court errors of the trial judge, even though these errors were not objected to by appellant's counsel at the trial. In order to overcome the general rule that

failure to object to error at trial waives the right to do so later, the error raised on appeal must be one affecting the substantial rights of appellant. In the present case, it is clear that they did so.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the conviction obtained in the Court below be reversed and the Court be directed to enter a verdict of acquittal in favor of appellant.

Respectfully submitted,

William G. Mahoney

Attorney for Appellant
(Appointed by this Court)

November 21, 1966

CERTIFICATE OF SERVICE

I hereby certify that I have today served the foregoing Brief of Appellant upon the United States of America by mailing a copy thereof, properly addressed, first class postage prepaid, to each of the following:

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November 21, 1966

PETITION OF APPELLANT
FOR REHEARING BY THE COURT EN BANC

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit
FILED FEB 3 1967
Nathan J. Paulson
CLERK

NO. 20,132

HERMAN F. GLASKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER AND JUDGMENT OF UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Comes now the appellant Herman F. Glasker and, through his counsel (appointed by this Court), respectfully petitions this Court to rehear and reconsider en banc his appeal in this case. Appellant sets forth the following grounds in support of said petition:

I

On January 19, 1967, this Court (acting through Chief Judge Bazelon, Senior Circuit Judge Miller, and Circuit Judge McGowan) issued a judgment affirming the action of the District Court by which appellant had been

convicted on two counts of assault with a dangerous weapon and sentenced to a term of three (3) to ten (10) years.

The Judgment stated merely that the Judgment of the District Court appealed from was affirmed.

II

Three major points were advanced by appellant on his appeal to this Court:

1. The conflicting and contradictory evidence of record of the so-called eyewitnesses was insufficient to support a verdict of guilty beyond a reasonable doubt;

2. The unwarranted delay between the arrest of appellant and the time he was informed on the specific nature of the crime for which he had been arrested prejudiced his ability to defend himself and constituted reversable error; and

3. Prejudicial error was committed by the trial judge in instructing the jury in such a manner as to give the impression that the jury had to "believe" the appellant was elsewhere at the time of the crime in order to find him not guilty of assault with a dangerous weapon thereby shifting some of the burden of proof to appellant.

III

The testimony of the two "eyewitnesses" for the prosecution, Banks and Holley, was contradictory in every aspect of the stories told by them of the events which they claimed to have observed. The only part of their stories which agree involves the identification of the appellant. It

is simply inconceivable that Banks and Holley could have been mistaken about each and every detail of each and every occurrence of the evening in question except for the identity of appellant. While it is true that the jury and not the Court must try the facts, Hardeman v. U. S., 82 U.S. App. D.C., 194, 163 F.2d 21 (D.C. Cir., 1947), determination of credibility usually involves a choice between opposing witnesses, but in this case such a determination lay between two prosecution witnesses. If one were to believe Banks' story, then Holley lied or was wrong in everything he said except the identification of appellant; and the same is true of Banks' testimony if one were to believe Holley. Certain of these contradictions could not have occurred if the "eyewitnesses" had witnessed the appellant run from the scene of the crime as they claimed. Faced with such totally contradictory testimony a reasonable mind must reject the hypothesis that appellant's guilt was established beyond a reasonable doubt. In Douglas v. U. S., ___ U.S. App. D. C. 239 F.2d 52 (D.C. Cir., 156) this Court held that a "jury may not be upheld in arbitrarily convicting of a crime". This Court said (239 F.2d at 59):

> "We as the reviewing court must be able to say that the result is rationally consistent with the evidence, measured by the required degree of proof."

Because appellant was not informed of the nature and circumstances of the offense for which he was arrested until one week after he was arrested which was almost three weeks after the crime had been committed, he was unable to verify an alibi as to his presence on the night in question. This delay coupled with the further detention of appellant until the week of May 9, substantially prejudiced his rights in the trial of his case, no

less than would have a confession extracted between the time of his arrest and his preliminary hearing. Giordenello v. United States, 357 U.S. 480 (1958); Mallory v. United States, 354 U.S. 449 (1957).

In light of the contradictory stories told by the "eyewitnesses", the instructions of the Trial Court become extremely important. In instructing the jury specifically on the charges of which appellant was found guilty, the Trial Court strongly implied that appellant had to make some sort of defense to the effect that he wasn't at the scene and the jury had to "believe" that he wasn't at the scene in order to acquit him. With regard to the charge of assault with a dangerous weapon on each of the two victims, the Trial Court instructed the jury (Tr. 204, 205, 207):

> "If you have a reasonable doubt about it, or if you don't believe he was there, or that he didn't do it, of course it would be your duty under the law to return a verdict of not guilty under the . . .indictment."

At the close of his instruction, the Court said (Tr. 207):

> "From the defense in this case it indicates a sort of defense of alibi, because he can't place himself there, and if he wasn't there, of course he couldn't be guilty of the crimes. If he was elsewhere, and that is what alibi means literally interpreted, means 'elsewhere' And, of course, he doesn't have to prove beyond a reasonable doubt or by a preponderance of the evidence. If the evidence is sufficient to raise a reasonable doubt in your minds whether he was there or not, then, of course, you must acquit him."

Appellant respectfully submits that the Trial Court here indicates to the jury that appellant must offer some evidence of his whereabouts even though it need not be a preponderance of the evidence or evidence beyond a reasonable doubt.

In Bollenbach v. United States, 326 U. S. 607 (1945) the Supreme Court said (326 U.S. at 612):

> "Particularly in criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

Again at 326 U.S. 613:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

And again at 326 U.S. 614:

> "It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

The complained of instruction of the Trial Court might not be considered prejudicial error in a case where there was strong evidence against the defendant, but this is a case in which the evidence consists only of contradictory stories told by the two youths. In Thomas v. U. S., (8th Cir., 1960) 281 F.2d 132, the United States Court of Appeals for the Eighth Circuit cited the rule (at 136):

> ". . .'error which in a close case might call for a reversal may be disregarded as harmless where the evidence fo guilt is strong.' Garner v. United States, 8 Cir., 277 F.2d 242, 245, citing Glasser v. United States, 315 U.S. 60, 67, 62 S.Ct. 457, 86 L.Ed. 680; Homan v. United States, 8 Cir., 279 F.2d 767, 773."

The jury was hung on all counts and so reported to the Court. The jury was returned for further deliberation and thereafter returned with its verdict of guilty on the two counts of assault with a dangerous weapon and not guilty on the one count of assault with intent to kill.

WHEREFORE, in light of the foregoing contradictions in the "eyewitness" testimony, the defendant's inability to verify an alibi because of the unwarranted refusal of the authorities to inform him of the specific nature and circumstances of the crime of which he had been arrested, and because of the misleading charge to the jury, the appellant respectfully petitions this Court to rehear and reconsider en banc his appeal.

Respectfully submitted,

William G. Mahoney

Attorney for Appellant
(Appointed by this Court)

February 3, 1967

PETITION OF APPELLANT
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PROOF OF SERVICE AND CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the attached petition for rehearing is presented in good faith and not for delay and certifies further that copies of the attached petition and this certificate were personally served on the following counsel for the United States this 3rd day of February, 1967, by leaving copies thereof at their respective offices:

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February 3, 1967